

1 MICHAEL C. ORMSBY
2 United States Attorney
3 Eastern District of Washington
4 Stephanie J. Lister
5 Assistant United States Attorney
6 James A. Goeke
7 Assistant United States Attorney
8 Post Office Box 1494
9 Spokane, WA 99210-1494
10 Telephone: (509) 353-2767

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10 UNITED STATES OF AMERICA,
11
12 Plaintiff,

13 vs.

14 CRAIG ALLEN MORGENSTERN,
15
16 Defendant.

14-CR-161-WFN

United States' Motion for
Victim-Witnesses to Attend Trial

February 17, 2016, at 10:00 a.m.

17
18
19 Plaintiff, United States of America, by and through Michael C. Ormsby, United
20 States Attorney, for the Eastern District of Washington, and Stephanie J. Lister and
21 James A. Goeke, Assistant United States Attorneys for the Eastern District of
22 Washington, moves this Court for an Order allowing victim-witnesses "Parent of
23 Person D" and "Parent of Persons B, C and E" to watch the entire trial, even though
24 they will likely testify during this trial.

25 Witnesses are generally barred from watching other witnesses' testimony until
26 after they are excused by the court as a witness. However, Section 3771 of Title 18,
27 entitled "Crime Victim's Rights", established the victim's right to attend the trial.
28 Section 3771 provides in relevant part:

1 (a) Rights of crime victims. A crime victim has the following rights:

2 ****

3 (3) The right not to be excluded from any such public court proceeding,
4 unless the court, after receiving clear and convincing evidence,
5 determines that testimony by the victim would be materially altered if the
6 victim heard other testimony at that proceeding.

7 18 U.S.C. Section 3771(a)(3). A crime victim, then, has the conditional right not to be
8 excluded from trial. *See generally United States v. Charles*, 456 F.3d 249 (1st Cir.
9 2006). Further, Section 3771 speaks to the exclusion of the witness from “other
10 testimony.” According to the very terms of Section 3771, the court may only exclude
11 the witness from testimony upon a specific finding “by clear and convincing evidence
12 that it is *highly likely*, not merely *possible*, that the victim-witness will alter his or her
13 testimony.” *In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006). As the *Mikhel* Court
14 went onto say,

15 Because there is always a *possibility* that one witness will alter his testimony
16 based on the testimony of another, were this the standard, a district court could
17 without exception exclude crime victims, and Congress’s intent to abrogate
Rule 615 with respect to crime victims would be rendered meaningless.

18 *Id.* The *Mikhel* Court imposed a materiality standard on Section 3771(a)(3) as well,
19 remanding the case to the district court to consider whether clear and convincing
20 evidence proves that the victim-witnesses’ testimony will be “materially altered” if
21 they are allowed to attend the trial in its entirety. *Id.* (citing *U.S. v. Johnson*, 362
22 F.Supp.2d 1043, 1056 (N.D. Iowa 2006).

23 The victim-witnesses are both parents of minor victims under the age of 18 and
24 are considered “crime victims” pursuant to 18 U.S.C. 3771 (e). The testimony of both
25 the “Parent of Person D” and the “Parent of Persons B, C, and E” will be limited to
26 how members of their family meet and became friends with the Defendant and will
27 include the identification of photographs of their minor children and other records.
28

1 The testimony of both these witnesses will not be altered by the testimony of other
2 witnesses.

3 The government respectfully requests that the Court issue an Order allowing
4 victim-witnesses "Parent of Person D" and "Parent of Persons B, C and E" to view the
5 entire trial, regardless of when they are called as government witnesses.

6 Dated: February 16, 2016.

7
8 MICHAEL C. ORSMBY
9 United States Attorney

10 s/ Stephanie J. Lister
11 Stephanie J. Lister
12 Assistant United States Attorney

13 James A. Goeke
14 Assistant United States Attorney
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Bryan P. Whitaker
whitakerattorney@hotmail.com

s/ Stephanie J. Lister
Stephanie J. Lister
Assistant United States Attorney